Police Force Act. It was the simplest act to do and he would not be in all this trouble. I agree with the Magistrate that the circumstances of this case call for a stern punishment. In my view three months imprisonment is not manifestly excessive.

The appeal is dismissed.

Appeal dismissed.

Solicitors: *David Marshall.*

CHUA BOON CHIN v. J.M. McCORMACK & ORS.

[O.C.J. (D'Cotta J.) April 11, 1979]

[Singapore — Originating Summons No. 258 of 1977]

Company Law — Liquidators — Conflict of interest — Liquidator also director of company — Application to remove — Companies Act (Cap. 185), s. 266.

Liquidators — Application to remove — Court's discretion — Test applied — Companies Act (Cap. 185), s. 266.

The plaintiff in this case applied for the removal of the defendants as the liquidators of Cycle & Carriage Co. (Realty) Ltd. (hereinafter called "the company") and that they be replaced by Messrs. Beaton and Repton. The company had eight directors of whom the first defendant McCormack was one. The other two defendants, Pollett and one Tan were accountants practising in partnership with the first defendant.

The company was voluntarily wound up and the defendants were appointed liquidators on March 26, 1975.

The company's investment included 9,064,664 shares of $1/- each fully paid up in Cycle & Carriage Ltd. (hereinafter referred to as "the listed company"). Of this amount, 6,043,110 shares were in C.C.R. Holdings. The listed company was a public company listed on the Stock Exchange of Singapore. The company's share holdings amounted to 32.2% of the capital of the listed company. The plaintiff held 134,508 fully paid up shares of $1/ each of the paid up capital of the company.

The plaintiff claimed that unknown to him, on November 27, 1974 the directors of the company had transferred 6,043,110 shares of the 9,064,664 shares the company held in the listed company in exchange for an equivalent number of shares in C.C.R. Holdings.

The plaintiff contended, *inter alia,* that on August 16, 1976 he offered to sell his 92,000 shares in C.C.R. Holdings at $3.05 per share which was the value of the listed shares. However he was only offered $1.60 per share as the shares of Holdings were not listed in the Stock Exchange of Singapore. In the three years that C.C.R. Holdings were in existence, the shareholders suffered a 3.25% loss of dividend income.

Held: (1) if the court is satisfied on the evidence before it that it is against the interest of the liquidation (all those interested in the company being liquidated), that a particular person should be made liquidator, then the court has power to remove the present liquidator and then to appoint some other person in his place;

(2) the plaintiff in this case had made out a *prima facie* case of misfeasance against the directors of the company.

Cases referred to:-

(1) *Re: Sir John Moore Gold Mining Co.* (1879) 12 L.R., Ch. D. 331.

(2) *Intercontinental Properties Pty. Ltd.* [1977] 2 A.C. L.R. 488.

(3) *Bray v. Ford* [1896] A.C. 51.

(4) *Re: Adam Eyton Ltd.* (1887) 36 Ch. D. 299.

(5) *Re: George A. Bond & Co. Ltd.* (1932) 32 S.R. (N.S.W.) 301.

ORIGINATING SUMMONS.

Lai Kew Chai for the plaintiff.

A.P. Godwin for the defendants.

Cur. Adv. Vult.

D'Cotta J.: This is an application by the plaintiff for an order that the defendants be removed from their offices as the liquidators of Cycle & Carriage Co. (Realty) Ltd. (hereinafter referred to as "the Company") and that they be replaced by Messrs. D.A. Beaton and G.C.T. Repton. The application is made under section 266 of the Companies Act (Cap. 185) which provides: —

"The court may on cause shown remove a liquidator and appoint another liquidator."

The company was incorporated on February 15, 1969 under the Companies Act. The company had 8 directors of whom the 1st defendant, Mr. J.M. McCormack was one. The other two defendants, M.H.G. Pollett and Tan Swan Jeng are accountants practising in partnership with the 1st defendant under the style of Coopers & Lybrand. By a special resolution passed at an extraordinary general meeting held on March 26, 1975, it was resolved that the company be voluntarily wound-up and the defendants were appointed liquidators.

According to the Annual Report and Statement of Accounts of the company, the company as at September 30, 1974, was the owner of a piece of property then known as "Liat Towers". Liat Towers is a property situated at Orchard Road, Singapore. One of the reasons advanced by the Board of Directors of the company in calling for voluntary liquidation was that in the event of Liat Towers being sold, the company's assets would consist principally of cash and investments which in the Board's view could be handled by individual members as well as by the company.

The company's investments included 9,064,664 shares of $1 each fully paid up in Cycle & Carriage Limited (hereinafter referred to as "the listed company"). Of this amount, 6,043,110 shares are in C.C.R. Holdings Ltd. (hereinafter called "C.C.R. Holdings") whose entire assets consisted of an equivalent number of shares in the listed company. C.C.R. Holdings was formed on July 23, 1974, as the plaintiff alleges, to hold or "lock in" the 6,043,110 shares in the listed company. The listed company is at all material times a public company listed on the Stock Exchange of Singapore and its shares are traded on that Stock Exchange. The company's share holdings amounted to 32.2% of the capital of the listed company. The plaintiff at all material times was a contributory of the company. He held 134,508 fully paid up shares of $1 each of the paid up capital of the company.

The plaintiff's complaint is as follows: —

Unknown to the plaintiff, on November 27, 1974, the directors of the company had transferred 6,043,110 shares of the 9,064,664 shares the company held in the listed company in exchange for an equivalent number of shares in C.C.R. Holdings.

The plaintiff alleges that the Chua brothers, Chua Boon Peng, Chua Boon Unn, Chua Boon Yew and Thomas Chua (hereinafter called "the Chuas") with the assistance of the 1st defendant, attempted to retain control of the listed company partly out of their control in C.C.R. Holdings. The plaintiff alleges that this was done solely for the benefit of the Chuas and not in any way for the benefit of the company. Instead of the plaintiff receiving his entitlement of shares in the listed company, the plaintiff in April 1975, received from the liquidators 94,079 shares in C.C.R. Holdings. This, the plaintiff alleges, is a breach of the fiduciary duties which the directors of the company owed the members of the company. The plaintiff says that in consequence of the said breach, he has suffered damage and loss.

On August 16, 1976, the plaintiff offered to sell his 92,000 shares in C.C.R. Holdings at $3.05 per share which was the value of the listed shares. However, he was only offered $1.60 per share as the shares of Holdings are not listed in the Stock Exchange of Singapore.

On June 9, 1975, the listed company paid a dividend of 10%. The plaintiff only received, after a lapse of some 10 months later, 8.75% of the 10% dividend as a result of the unwarranted interposition of C.C.R. Holdings. Subsequently two more dividends amounting to 25% were received by C.C.R. Holdings from the listed company. Out of this 25% C.C.R. Holdings paid a dividend of 23% only. In the three years that C.C.R. Holdings were in existence, shareholders suffered a 3.25% loss of dividend income.

The plaintiff protested against the appointment of 8 directors to the Board of C.C.R. Holdings which being an investment holding company had very little work. The payment of $32,000 by way of directors' fees for the year ended 1976 was an unjustified extravagance. It was also alleged that the directors were not frank in their dealings with the shareholders. On enquiring why 6,043,110 shares in the listed company were transferred first from Cycle & Carriage Co. (1926) Ltd. to the company and subsequently from the company to C.C.R. Holdings, the plaintiff was told that it was part of the "re-construction" and that "enormous benefits" accrued from the setting up of C.C.R. Holdings — see Exhibit AB37.

The plaintiff commenced proceedings on August 8, 1977. He gave evidence and was cross-examined by counsel for the defendants.

The defendants did not avail themselves of the opportunity of giving evidence on oath and having their evidence tested in cross-examination. Learned counsel for the defendants informed the court that after consideration he was not desirous of calling the 1st defendant to give evidence. In this connection I would like to refer to the Order of Court made in these proceedings dated November 11, 1977 and in particular to prayers 1, 2 and 3 which are as follows: —

"1 That the plaintiff be and is hereby at liberty to cross-examine the abovenamed first defendant, John Maxwell McCormack, upon the affidavit sworn by him and filed on the 1st day of October 1977 by the defendants for the purposes of being used as evidence at the hearing of the plaintiff's application herein by O.S. dated the 8th day of August 1977;

2 That such cross-examination hereinbefore ordered be taken at the hearing of the Originating Summons herein; and

3 That unless the said first defendant attend the said affidavit shall not be used as evidence by the defendants in these proceedings except by the special leave of the judge."

The court is thus placed in a somewhat difficult position as the allegations made by the plaintiff have not been answered or rebutted by the defendants as a result of which in considering this application as far as the defendants' case is concerned, the court must rely on the facts elicited in the agreed bundle and on the submission of learned counsel for the defendants.

It is not disputed that Cycle & Carriage Ltd. hold a franchise for the Mercedes Benz cars in Singapore. Whatever was done by the directors of Cycle & Carriage Ltd. as gleaned from the correspondence was done at the insistence of M/s. Daimler-Benz who, in agreeing to give Cycle & Carriage Ltd. a 5 year franchise contract, were insistent, among other things —

(1) that the 4 Chuas must remain;

(2) the new company to be formed by the present shareholders of (1926) must at all times hold a minimum of 30% of the Holding company;

(3) the four Chuas must enter into long-term service contracts; and

(4) regular quarterly reports of changes in share holdings to be made.

M/s. Daimler-Benz gave the listed company a further franchise as they had come to know and trust the Chuas, but insisted that the latter should always have a controlling factor in the company concerned.

Learned counsel for the defendants in his submission stated that the allegation of misfeasance does not even disclose a *prima facie* case. Learned counsel for the plaintiff, on the other hand, in his submission contends that a clear *prima facie* case of misfeasance had been made out against the directors of the company, the 1st defendant being a director.

Firstly let us deal with the submission of learned counsel for the defendants that whatever was done by the directors in the formation of the new listed company, insofar as what percentage of the issued capital was to be held by the company, was done on the insistence of Daimler-Benz group. I would like to refer to Exhibit AB2, paragraph 2, which is a letter from the Daimler-Benz group to Mr. Chua Boon Unn, managing director of Cycle & Carriage Ltd. It is quite clear from paragraph 2 that the plan to have 30% of the new shares controlled en block by the existing company (1926) and 20% by the individual family members was far from being at the insistence of Daimler-Benz but was actually a proposition that was put by the Chuas to Daimler-Benz.

The plaintiff's application is made under section 266 of the Companies Act (Cap. 185) which provides "that a court may, on cause shown, remove a liquidator and appoint another liquidator". This section

is *in pari materia* to section 304(2) of the Companies Act, 1948 which is as follows: —

"The court may on cause shown remove a liquidator and appoint another liquidator."

The court is given a discretion to remove the liquidator on cause shown.

In *Re: Sir John Moore Gold Mining Co.*,[1] Jessel M.R. defined the words "on due cause shown" which then formed part of section 141 of the Companies Act of 1862 as follows: —

"I should say that, as a general rule, they point to some unfitness of the person — it may be from personal character, or from his connection with other parties, or from circumstances in which he is mixed up — some unfitness in a wide sense of the term."

Again, in *Intercontinental Properties Pty. Ltd.*[2] it was held, *inter alia,* that the court will not normally appoint as liquidator a person who may be placed in a position where his interest and duty may conflict and if after appointment a position of conflict emerges the court may in a proper case remove the liquidator.

Now what are the circumstances here. The question for determination by the court is whether under all the circumstances of the present case due cause has been shown for the removal of the liquidator. In attempting to determine this question, firstly it is pertinent to note that we are dealing with a case where one of the liquidators is also a director and has been a director in this company since its inception and the fact that as such he is closely connected with the other directors. Directors of a company stand vis-a-vis in a fiduciary position to the company. Their duties being to exercise their powers for the benefit of the company as a whole and not to put themselves in a position in which their duties and their personal interest may conflict. It is an inflexible rule of the court of equity that a person in a fiduciary position is not allowed to put himself in a position where his interest and duty conflict. This rule is based on the consideration that human nature being what it is, there is danger of a person holding a fiduciary position being swayed by interest rather than by duty and thereby prejudicing those whom he was bound to protect — per Lord Herschell in *Bray* v. *Ford.*[3]

In determining the question whether under all the circumstances of the present case, due cause has been shown for the removal of the liquidator, I am content to be guided by the principles laid down in *Re: Adam Eyton Ltd.*,[4] and to the judgment of Cotton L.J. at page 303 where in commenting on the judgment of Jessel M.R. in the case of *Re: Sir John Moore Gold Mining Co., supra,* he goes on to say: —

"He does not intend to exhaust all the grounds but in my opinion and I believe the rest of the court agree with me, if the court is satisfied on the evidence before it that it is against the interest of the liquidation, by which I mean all those who are interested in the company being liquidated, that a particular person should be made liquidator, then the court has power to remove the present liquidator and of course then to appoint some other person in his place."

In the same case, Bowen L.J. at page 306 said: —

"... the due cause is to be measured by reference to the real, substantial, honest interest of the liquidation and to the purpose for which the liquidator is appointed. Of course fair play to the liquidator himself is not to be left out of sight, but the measure of due cause is the substantial and real interest of the liquidation."

Long Innes J. in *Re: George A. Bond & Co. Ltd.*[5] had this to say: —

"In my view neither suspicion alone, nor even a *prima facie* case which might be rebutted, would either justify or require removal unless there were reason for apprehension that the interests of the liquidation would be imperilled by the continuance in office of the suspect, or unless it were shown that such removal would be for the advantage of those interested in the assets of the company."

It follows that a liquidator can be removed if the cause shown points to some unfitness of the person in the test as laid down by Jessel M.R. in *Re: Sir John Moore Gold Mining Co.* and also where the court exercises its discretion if satisfied on the evidence before it that it is against the interest of the liquidation that a particular person should be appointed liquidator.

Now what is the position of the 1st defendant. He is one of the liquidators; he is also a director of the company and has been so since its inception; he has also been a secretary of the company which capacities have brought him in close relationship with the other directors of the company and as a director he can be said to have an interest which might interfere with his duties as liquidator e.g. if during the course of the liquidation a stage is reached where he has to decide whether or not to commence legal proceedings against the directors, a most ludicrous situation will arise when he has to decide whether in his capacity as liquidator he must sue himself as a director.

While on the subject of the *Bond* case, there are other important aspects of this case which I consider most relevant and which appear to have escaped the attention of learned counsel and it is this. The court in the *George Bond* case found, *inter alia,* that "in reference to the charges involving turpitude, both Mr. Palmer and Mr. Nelson (who was the liquidator) made on every occasion both to the court, the creditors and shareholders, the most full and frank disclosure of every material fact and that there was not the slightest ground for any suspicion to the contrary". Before concluding his judgment, Long Innes J. said at page 313 and I quote: —

"As this case may go further I think I should state for the information of the Appellate Court that both Mr. Nelson and Mr. Downing impressed me as honest and truthful witnesses, and that there was nothing in the demeanour of any witness whom I saw in the box to lead me to distrust his evidence."

It is pertinent to note that in this case (the *Bond* case) and also in the other authorities quoted, the court had the opportunity and advantage of seeing and hearing all the relevant witnesses and then being in the happy position where they could make a genuine finding and being able to justify such finding.

In the present case before me, the allegations made by the plaintiff have not been challenged or rebutted by any of the defendants. In considering an application of such a nature i.e. removal of a liquidator, the courts were unanimous that in arriving at a conclusion whether or not a liquidator should be removed, fair play to the liquidator himself is not to be left out of sight. Nevertheless, I must reiterate that I have not had the opportunity of hearing the 1st defendant or any of the other liquidators and

in considering the question of fair play, I think the ball was at the liquidators' feet: it was their duty to play fair and assist the court by explaining the correct position to the court and acquainting the court with all the material facts and answering the allegations made by the plaintiff so as to leave the court in no doubt that what was done was done with reference to the real, substantial and honest interest of the liquidation and to the general advantage of those interested in the assets of the company. This I must state quite categorically has been denied me. Quite obviously the liquidators have failed to discharge the onus.

I have also considered the question raised by learned counsel for the defendants that the liquidation of the company has almost been completed. I would like to refer again to the *Bond* case where during the application before the court, Mr. Nelson, the liquidator offered to give an undertaking to the court to the effect that he would take no objection to the institution of any proceedings against him in respect of any alleged misfeasance and to abstain from procuring a dissolution of the company for any reasonable period in order to permit the institution and prosecution of such proceedings. Needless to add, the offer of Mr. Nelson was accepted.

The plaintiff commenced these proceedings on August 8, 1977. No such undertaking was offered by the defendants, on the contrary they proceeded to wind-up the company oblivious to the fact that the plaintiff had already instituted proceedings. The liquidator must be independent and impartial: see *Re: Reberton Pty. Ltd.* decided on April 24, 1978 by the Supreme Court of New South Wales and commented upon in (1978) *Butterworths Company Law Bulletin* page 99.

I am satisfied that a *prima facie* case of misfeasance has been made out against the directors of the company. I am also satisfied from the foregoing that the applicant has shown due cause that it is for the general advantage of those interested in the assets of the company that the 1st defendant should be removed as liquidator of the company and I so order.

It must follow that since the 2nd and 3rd defendants are partners of the 1st defendant insofar as they belong to the same firm of accountants, the order must also extend to them. There will be an order in terms of the originating summons.

Order accordingly.

Solicitors: *Lee & Lee; Donaldson & Burkinshaw.*

BUI VAN TUYEN & ANOR. v. OVERSEAS UNION ENTERPRISE LTD.

[O.C.J. (Choor Singh J.) April 16, 1979]

[Singapore — Civil Suit No. 1538 of 1976]

Torts — Negligence — Damages — Claim for damages for loss of goods in hotel suite — Theft consequent upon loss of key to suite.

Hotel — Negligence — Duty to take proper care of door key.

The plaintiffs claimed from the defendants damages amounting to $616,379.30 for the loss of their goods which were stolen from their hotel suite. The defendants were the owners of the said hotel.

Evidence revealed that the plaintiffs, wealthy Vietnamese, checked into the hotel and were given suite 2626. The first plaintiff claimed that she placed all her jewellery in her crocodile handbag which she placed under some clothing in her suitcase and locked it. The door to the hotel suite was locked and the only ones who had access to it, apart from the plaintiffs themselves, were the cleaning maids. A hotel security guard was placed at the corridor outside the plaintiffs' suite. On the actual day of the theft, the second plaintiff claimed that he handed the key of their suite to the hotel's receptionist, one Christopher Chiang who placed the key in the key slot.

Investigations revealed that a European man was in suite 2626 while the plaintiffs were away at lunch. On their return to the suite, they found that it had been ransacked. The suitcases had been forced open and the contents of the crocodile handbag had disappeared.

Held: (1) the plaintiffs had made out a *prima facie* case based on the tort of negligence. The key gave access to the plaintiffs' suite and it was the duty of the defendants to take reasonable care to see that it was not taken by any unauthorised person. It was so taken and consequences followed which might reasonably have been foreseen — a thief used it to get into the plaintiff's suite and steal;

(2) in the circumstances of this case, the failure of the plaintiffs to deposit their jewellery and other valuables in the safe deposit box of the defendants did not constitute negligence on their part.

Cases referred to:-

(1) *Carpenter* v. *Haymarket Hotel Ltd.* [1931] 1 K.B. 364
(2) *Shacklock* v. *Ethorpe Ltd.* [1939] 3 All E.R. 372.
(3) *Williams* v. *Linnitt* [1951] 1 All E.R. 278.
(4) *Olley* v. *Marlborough Court, Ltd.* [1949] 1 All E.R. 127, 134.
(5) *Cashill* v. *Wright* 119 E.R. 1096, 1099.

CIVIL SUIT.

L.A.J. Smith (*Patrick Ong* with him) for the plaintiffs.

J. Grimberg (*Robert Yap* with him) for the defendants.

Cur. Adv. Vult.

Choor Singh J.: In this action the plaintiffs claim from the defendants the sum of S$616,379.30 being damages for the loss of their goods, i.e. wearing apparel, jewellery ornaments, moneys and cheques which were stolen on April 1, 1975 from a suite occupied by them at the defendants' hotel called "The Mandarin Hotel" at No. 333 Orchard Road, Singapore.

The facts are very simple and they are these. The second plaintiff is the husband of the first plaintiff. They are both Vietnamese and have extensive investments in Vietnam as well as in Europe but they live in Paris. Before the fall of Saigon the husband